UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

RADIX WIRE COMPANY

Employer,

and Case No. 8-RD-2025

JOSEPH FUNNELL, JR., An Individual

Petitioner,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND ITS LOCAL UNION 5-142[1]

Union.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has deleted its authority in this proceeding to the undersigned.[2]

The record indicates that there are approximately 32 employees in the unit found appropriate.

[1] The Union's name appears as amended at the hearing.

[2] The Employer and the Union have filed post-hearing briefs which have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. The labor organization involved claims to represent certain employees of the Employer. The Petitioner asserts that the Union is no longer the unit employees' collective bargaining representative as defined in Section 9(a) of the Act. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Three witnesses testified at the hearing: the Employer's Operations Manager, David Sheppard, Petitioner Joseph Funnell, Jr. and Gary Thompson, the Union's Staff Representative.

I. Issue

Whether the Employer has met the burden of establishing that current employees were hired as permanent replacements for economic strikers who struck for a period in excess of 12 months.[3]

II. DECISION SUMMARY

I find that the current employees are permanent replacements for the economic strikers and are eligible to vote in the decertification election. I further find that the economic strikers are ineligible to vote in the election.

III. BACKGROUND

Radix Wire Company is a manufacturer of high temperature wire products with an office and plant located in Euclid, Ohio. The existing bargaining unit of production and maintenance employees was initially represented by the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) which recently merged with the Steelworkers to become the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

The most recent contract between the parties was terminated effective October 6, 2003.[4] Employees continued to work without a contract until April 27, 2004, when all 29 employees participated in an economic strike.[5]

IV. FACTS

Operations Manager David Sheppard testified that he was responsible for maintaining production during the strike and was directly involved in hiring replacement workers for the strikers. He further explained that the Employer determined it would hire permanent replacements rather than temporary replacements because of the training, time, effort and money

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[3] The status of economic strikers as eligible voters was dealt with in the 1959 amendments to the Act by adding the following provision to Section 9(c)(3):

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

[4] The most recent contract between the parties was to expire August 19, 2003, but a Memorandum of Agreement extended the collective bargaining agreement on a rolling five day basis requiring at least five day written notice to terminate. On September 30, 2003, the Employer provided the requisite notice and the agreement terminated on October 6, 2003.

[5] The instant decertification petition was filed June 17, 2005. On July 18, 2005, the Union notified the Employer and its counsel of the striking employees' unconditional offer to return to work immediately. Attached to the offer were the names of the 29 economic strikers. At the time of the hearing, none of the strikers had returned to work. Documentation introduced at the hearing demonstrates that on May 3, 2004, the Employer notified the Union in writing that it was hiring permanent replacements.

involved in replacing strikers. According to Sheppard, the Employer concluded it would hire permanent rather than temporary employees in order to ensure a return on its investment. The initial replacements were hired April 27, and 28 and began working April 29, 2004. According to Sheppard, hiring continued in May and June and by early June 2004, the Employer had hired permanent replacements for all 29 striking employees.

Sheppard testified that he personally interviewed applicants and hired each of the replacements.[6] Sheppard testified that he conducted face-to-face interviews, that he informed each candidate that the Employer was in the midst of a strike and that it was hiring permanent replacements with the intention of retaining them after the strike. Sheppard stated he showed each applicant a document and explained to each applicant that they would be required to sign it in the event they were hired. Sheppard testified that he informed applicants that by signing the written agreement they would be acknowledging that they were hired as permanent replacements with a right to continue employment after the strike. He also testified that he told each applicant that the agreement had an escape clause in it which referred to a court order.[7]

Sheppard testified that after each interview, he made the decision whether to hire the applicant or not. Thereafter, Sheppard made arrangements for the referring agency to extend the actual offer, obtain the applicant's signature on the replacement agreement, complete an application and take the Employer's physical examination and drug test.[8]

The only current or former replacement employee providing testimony at the hearing was the Petitioner, Joseph Funnell, Jr.. Funnell testified that he was interviewed by Sheppard and informed that if hired, he would be a permanent replacement for a striking employee and that barring any court order his employment would continue after the strike was over. Funnell

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[6] The record demonstrates that the Employer utilized two employment referral sources to generate candidates. All current employees and the majority of applicants were referred by Champion Employment Systems. During cross examination, Sheppard acknowledged that during a brief period at the end of 2004, the Employer also utilized another agency, AreaTemps. Sheppard testified that it hired four referrals from AreaTemps; however, these employees are no longer employed by Radix Wire Company. Finally, Sheppard testified that he employed the same interviewing and hiring procedures whether applicants were referred by Champion Employment Services or AreaTemps.

[7] There were three written agreements utilized by the Employer. All current employees signed one of two versions introduced by the Employer. The third version., introduced by the Union, was apparently used with applicants referred to the Employer by AreaTemps. The first sentence of all three versions confirm an offer of employment as a "permanent replacement for one of the striking employees…" Each version is signed by Sheppard and the new hire. Each version of the written agreements introduced also contains clauses advising employees that their continued employment is subject to any court or agency order or any contractual undertaking requiring the reinstatement of striking employees. One of the two versions executed by current employees sets forth an acknowledgement that the employee and the Employer acknowledge the at-will nature of the relationship. The other version signed by current employees and the version used by former employees referred by AreaTemps cautions that the employees' tenure of employment remains subject to satisfactory job performance. The written agreements executed by employees referred by AreaTemps contain one unique provision which provides that "while payrolled through AreaTemps you will be considered an employee of both Radix and AreaTemps." During redirect testimony Sheppard explained that the period during which the four former replacements referred by AreaTemps were "payrolled" through AreaTemps was limited to their initial week of employment.

[8] Sheppard testified that in a few instances, early in the strike, Human Resource Manager Chris Sponseller was present at the office of Champion Employment Services and personally conveyed the offer of employment. Sponseller did not testify.

testified he had no doubt that he had been offered permanent employment by the Employer, noting he would otherwise not have quit his former job of fifteen years duration. During cross-examination, Funnell acknowledged that by executing the acceptance of employment document he was agreeing that he was an at-will employee. When asked by counsel for the Union whether he also understood his employment could be terminated if there was a contractual undertaking that required the reinstatement of the striking employees, Funnell conceded he was not sure what that language in the document meant but did understand that he was a permanent replacement and would remain an employee after the strike, barring a court order. Finally, Funnell testified that he understood that even after he successfully completed his probationary period, he could be terminated for any lawful reason, noting, "Yes, if I screw up, just as any other job."

Sheppard testified without contradiction that he met with every replacement employee on their first day of work and offered them additional assurances of their permanent replacement status. Specifically, he reaffirmed to the employees that they had been hired as permanent replacements and that the Employer had the right and the intent to continue the employees' employment after the strike ended.

Funnell likewise testified that he met with Sheppard during his first days of employment and that Sheppard once again reiterated that he had been hired as a permanent replacement employee and, barring a court order, he would continue employment after the strike was over.

Sheppard further assured employees of their status in a document entitled "Memo to Radix Hourly Employees" dated July 16, 2004, which remains posted on the main plant bulletin board. The memo addresses questions regarding employees' status as permanent replacements and the rights of strikers to return if they end their strike. Sheppard writes:

> Let me assure you that you all have been hired as permanent, as opposed to temporary, replacements. This means that even if the strike ends, anyone who was on strike will not have the right to take your job. Under the law, as a permanent replacement, you are entitled to keep your job even if the strike ends. A striking employee only is entitled to come back to work if he is qualified for an opening in a job position which is substantially equivalent to the job he had before the strike.
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> Based on our business projections over the foreseeable future, we do not anticipate that there will be additional job positions over what we have now. Thus, absent some type of court order or negotiated agreement, which we do not anticipate happening, the only way a striker would be able to get his job back if he ended his participation in the strike, is if someone decides to leave or is terminated.[9]

[9] Sheppard testified that the Employer had not been receiving questions from employees on their permanent status but he posted the July 15, 2004 memo on advice of counsel. He acknowledged receiving some questions about bumping rights in the event the strike ended and strikers re-entered the workforce.

Sheppard testified that employees would have noticed the July 16, 2004 document because it was posted on the main conference bulletin board which employees would walk by each day. Funnell confirmed he and other employees had seen the July 15, 2004 memorandum.

Sheppard testified that all employees hired to replace strikers have been eligible to receive various insurance benefits, vacation pay, holiday pay, bereavement pay and all other benefits enjoyed by permanent employees. In further support of the contention that the replacement employees are permanent replacements, the Employer introduced written job descriptions for two new positions and one revised position. The caption on these descriptions indicate that the positions applied to "permanent replacement" employees. In addition, Sheppard testified that the descriptions pertaining to the new classifications of high temperature lead operator and silicone rubber leader operator were posted on the plant's main bulletin board, while the revised job description for the shipper/receiver position was distributed to employees in that department.

IV. ANALYSIS

The Board has held that economic strikers retain voter eligibility even after the 12-month period established by Section 9(c)(3) of the Act, if they have not been permanently replaced. Gulf States Paper Corp., 219 NLRB 806 (1975); Erman Corporation, 300 NLRB 95 (1999). Accordingly, in Gulf States, the Board concluded that unreplaced economic strikers were eligible to vote in a decertification election held more than one year after the commencement of a strike. 219 NLRB 806.

In O.E. Butterfield, Inc., 319 NLRB 1004 (1995), the Board addressed the then existing inconsistency in representation and unfair labor practice cases concerning the allocation of the burden of proof concerning whether replacements for economic strikers were permanent or temporary employees. In Butterfield, which involved determinative challenges in a decertification election, the Board held it would apply a single standard in all Board proceedings. That standard establishes the burden is on the employer to prove that strike replacements are permanent employees. 319 NLRB 1004 at 1006. In so doing the Board explained:

> Because an employer is the party with superior access to the relevant information, the burden should logically be placed on it to show that it had a mutual understanding with the replacements that they are permanent. In addition, this allocation of the burden of proof has been upheld by the courts. See NLRB v. Augusta Bakery Corp., 957 F.2d 1467 (7th Cir. 1992).

Applying this rationale to the record, in that case, the Board overruled the challenge to a replacement employee's ballot. In so doing, the Board concluded that the employer had sustained its burden of establishing that it and the replacement employee had a mutual understanding that he was a permanent replacement for an economic striker. The Board based its finding on the uncontradicted testimony of the striker replacement that sometime after his hire he approached the employer's president who informed him that he was a permanent employee. 319 NLRB 1004 at 1006-1007.

In the instant case, Sheppard provided uncontroverted testimony that he personally advised each applicant for employment that, if hired, his status would be that of a permanent replacement for a striking employee. Additionally, he testified that he informed applicants that, if hired, they would be signing a document in which they acknowledged that they were being offered employment as a permanent replacement for one of the striking employees. He also testified, without contradiction, that he spoke with each new hire as each initially reported and at that time reiterated that they were hired as permanent replacements. The testimony of current employee Funnell supported Sheppard's testimony and was itself uncontroverted. At the hearing, the Employer produced a copy of the acknowledgement of permanent employment status from each current replacement employee. These acknowledgements are signed by both the replacement employee and Sheppard. Thereafter, Sheppard posted a July 2004 memorandum directed to replacement employees which again confirmed that the employees were hired as permanent as opposed to temporary replacements. Other testimony revealed that benefits were extended to the replacement employees consistent with the Employer's established practice regarding permanent employees.

The Union argues that the replacements were temporary employees and that any oral statements to these employees to the effect that they were permanent replacements is contradicted by the acknowledgements and applications signed by every replacement. The Union, citing Harvey Mfg., 309 NLRB 465 at 468 (1992), argues that the resultant ambiguity should be construed against the employer. Specifically, the Union argues that the at-will language in the applications, the various escape clauses in the acknowledgements and Sheppard's July 2004 memorandum reaffirming permanent status absent some type of court order or negotiated agreement, demonstrated that the Employer failed to meet its burden of establishing that it had a mutual understanding with the replacements that they were permanent.

The facts in Harvey Mfg. are distinguishable from the instant case. In Harvey Mfg., the employees received and signed a document entitled "Temporary Agreement" which began with an acknowledgement of their temporary status. In addition the replacements received a referral slip describing their "temporary position" status from the referring agency and presented this slip to the employer. Finally, after 30-days the replacement employees received a document addressed to "New Employees Working as Temporaries of Harvey Industrial, Inc." This document began "You will be working for us as a temporary employee." 309 NLRB 465 at 468. While recognizing that oral representations of permanent status were made at various points to replacements, the Board, under these circumstances, concluded that these replacements were no more than temporary strike replacements.

In the instant case, there is no testimony or documentation referring to replacements as temporary employees. The reference to at-will employment in the applications or the new hire agreements does not transform an offer of a permanent position into that of a temporary position. Further, the July 15, 2004 memorandum from Sheppard to hourly employees specifically reiterates that employees had been hired as permanent as opposed to temporary replacements. The language described in the new hire agreements acknowledging that the replacement's continued employment was subject to any court or agency order or contractual undertaking

requiring the reinstatement of the employer's striking employees similarly does not convert the replacements' permanent status to that of temporary employees.

In Belknap, Inc. v. Hale, et al., 463 U.S. 491 at 503 (1983), the Supreme Court concluded that: "An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike."

The Union also cites Capehorn Industry, Inc., 336 NLRB 364 (2001), for the proposition that the employer bears the burden of providing replacement employees' status as permanent as opposed to temporary employees. In Capehorn, the Board affirmed the judge's finding that replacement employees were temporary. In reaching this decision, the Board commented upon the absence of documentary evidence or testimony from replacements or from the managers who hired them. In addition, the Board concluded that vague statements by the vice president to certain replacements, even if credited, were insufficient to establish a mutual understanding between the employer and the replacements that replacements were hired on a permanent basis. 336 NLRB 364 at 365. Capehorn is readily distinguishable from the instant case, given that here the testimony of the Petitioner, a replacement, and Sheppard, the individual responsible for each replacement's hire, was provided and supports finding a mutual understanding that the employment status was permanent.

Also, unlike Capehorn, the Employer provided the testimony of Sheppard who personally interviewed, hired and met with each replacement on their initial day of work. The Petitioner's testimony was consistent with that of Sheppard. Finally, the Employer provided documentary evidence signed by each of the current replacements and Sheppard.

The Union's reliance on Target Rock Corporation, 324 NLRB 373 (1997) is similarly misplaced. In that case, the Board concluded that the evidence failed to demonstrate that the employer and the replacement employees shared a mutual understanding that replacements were hired as permanent employees. 324 NLRB 373 at 375. The Board in Target Rock concluded that statements attributed to employer representatives "amply demonstrate the Respondent's own belief that the replacements were no more than temporary employees." Id. at 374. The Board also noted that the text of the advertisement seeking replacements indicated "all positions could lead to permanent full-time after the strike." (emphasis added) Id. at 373. Finally, the Board noted that the record revealed substantial evidence that the replacements did not understand that they were hired as permanent employees. Id. at 373.

In the present case, based on the record evidence and precedent cited, I conclude that the replacements were hired as permanent as opposed to temporary replacements for the economic strikers and accordingly, the economic strikers are ineligible to vote in the directed election to be scheduled in excess of 12 months from the commencement of the strike.

In addition, the parties have stipulated that the following named individuals occupy the positions set forth opposite their respective names and agree that these individuals are ineligible to vote in the election directed herein:

Jim Gardner	-	Trainee Supervisor/Former Plant Manager
Bill Toll	-	General Supervisor of Facility
Dave Sheppard	-	Operations Manager
Robert Ryan	-	Engineer

Based upon the parties' representation, agreement and record I find that the above specified individuals are ineligible to vote.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local Union 5-142.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966)**; **N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the ***full*** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by October 5, 2005.

Dated at Cleveland, Ohio this 21st day of September 2005.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8